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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-690

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,
Petitioner,

v.

WESTERN ALFALFA CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Colorado

---

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reproduced as Appendix A to the Petition. Certiorari was denied by the Supreme Court of the State of Colorado.

Rule 35(f) of the Colorado Appellate Rules provides in part:

> ". . . Only the opinions officially selected for publication shall be binding upon the trial judges of the state of Colorado and shall be considered as stare decisis for the point of law settled therein; provided,

however, they do not conflict with any decisions of the Colorado Supreme Court. Denial of certiorari by the Supreme Court shall not necessarily be taken as an approval by the Supreme Court of any opinion of the court of appeals."

The opinion of the Colorado Court of Appeals sought to be reviewed was not officially selected for publication.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Does the taking of opacity readings on the premises of an emission source without either a search warrant or the consent or knowledge of the owner of the premises constitute an unreasonable search under the Fourth Amendment to the Constitution of the United States?

2. Is a person charged with an air pollution violation afforded procedural due process when the only evidence to support the charge is the uncorroborated observations of an investigator made without the knowledge of the accused which thereby foreclosed the accused of any opportunity to present its own evidence as to the nature (opacity) of the emissions at the particular time of investigator's observations?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article IV of the Amendments to the Constitution of the United States, set forth in the Petition.

B. The Due Process Clause of Article XIV of the Amendments to the United States Constitution:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

C. Air Pollution Act of the State of Colorado in effect at time of alleged offense set forth in full in Appendix D to Petition.

D. Colorado Revised Statutes 1963, 66-29-8(d), 1969 Perm. Supp., which reads as follows:

"66-29-8. *Powers and duties of the division.* . . .

. . . "(d) Enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or non-compliance with any emission standard or any order under this article, *except that if such entry or inspection is denied or not consented to and no emergency exists, the division is empowered to and shall obtain from the district or county court for the district or county in which such property, premise, or place is located, a warrant to enter and inspect any such property, premise, or place prior to entry and inspection.* The district and county courts of the state of Colorado are empowered to issue such warrants upon a proper showing of the need for such entry and inspection. Any information relating to secret process, or methods of manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination;"

Above provision effective July 1, 1969 (Emphasis supplied)

E. Colorado Revised Statutes 1963, 3-16-5(1) and (7):

"3-16-5. *Judicial review.*—(1) In order to assure a plain, simple, and prompt judicial remedy to per-

sons or parties adversely affected or aggrieved by agency actions the provisions of this section shall be applicable.

. . .

"(7) If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article, or otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, *unsupported by substantial evidence when the record is considered as a whole*, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established." (Emphasis supplied.)

STATEMENT OF THE CASE

This case is concerned with the means employed by the Department of Health of the State of Colorado in securing a Cease and Desist Order against an alfalfa dehydrating plant on the grounds of alleged air pollution resulting from the plant's operation.

The case began with a letter dated June 16, 1969, from the Department of Health, Division of Enforcement (Division) advising respondent that twelve days earlier, on June 4th, emissions from its dehydrating plant were darker in shade than permitted by the Colorado Air Pollution Control Act. The letter concluded with a Cease and Desist Order to be complied with in 10 days. Respondent denied the alleged violation and asked for a hearing before the Air Pollution Variance Board.

At the hearing the field inspector who made the observation in question testified that he was on the premises of respondent unaccompanied by anyone else and without the knowledge of the respondent's employees there. Since respondent did not know until almost two weeks later that it had been inspected, it could offer no evidence of the shade of darkness of its emissions on the day in question, although respondent did show that its emissions were not in violation both before and after the day in question. Since respondent could offer no evidence to contradict the brief 10-minute observations of the enforcement official, the Board sustained the issuance of the Cease and Desist Order.

On appeal, the District Court of Weld County, Colorado, set aside the decision of the Variance Board. The Colorado Court of Appeals affirmed, and the Supreme Court of the State of Colorado denied certiorari.

REASONS FOR DENYING THE WRIT

In the tribunals below, the Variance Board, the District Court, the Court of Appeals and the Supreme Court, the basic issue has been the substantive adequacy and procedural due process of the State's case against respondent charging a violation during a 10-minute period on June 4, 1969 of the opacity regulation set forth in the Air Pollution Control Act of the State of Colorado.

Without ever coming to the Fourth Amendment question of an unreasonable or illegal search, the decision of the Colorado Court is adequately grounded on Colorado law.

Colorado law provides in the Administrative Code that a state court in reviewing agency action shall "hold unlawful and set aside the agency action" if it finds the action is "unsupported by substantial evidence when the record is considered as a whole." CRS 1963 3-16-5(7), 1969 Perm. Cum. Supp.

The District Court in its review of the agency action in question, the Decision of the Variance Board, stated the following conclusion and findings:

> "1. That the hearing afforded Petitioner by the Air Pollution Variance Board lacked those fundamental elements required by due process of law and the well developed standards of fairness which are expected in proceedings involving the serious consequences sought by Respondent.
>
> "2. Petitioner was foreclosed from presenting any evidence on its behalf since the observations of the State expert were made in secret without Petitioner being advised of his presence until the Cease and Desist Order was issued some twelve days later.
>
> "3. The refusal of the Division of Administration of the State Department of Health to certify as smoke reading experts those persons attending its smoke reading training school who are not public employees precludes those accused of pollution from presenting expert testimony which will be received and considered by the Variance Board which action is offensive to this Court's sense of fairness.
>
> "4. The Variance Board erred in considering only evidence of Ringlemann observations and in not considering more scientific test made or which could have been made, particularly considering the fact

that the emission here in question is largely mixed with steam, a nonpollutant. In this situation the Ringlemann observations are particularly suspect and the Variance Board should require more substantial evidence.

"5. *The finding of the violation by the Variance Board was not supported by substantial evidence* but was based only upon an uncorroborated testimony of approximately 10 minutes observation by one witness, and Petitioner was afforded no opportunity whatsoever to present any evidence to the contrary." (Emphasis supplied.)

The Colorado Court of Appeals addressed itself to the frailty of the state's case with the following:

"In the instant case, the evidence that resulted in issuance of the cease and desist order was gathered by a field inspector from the Division, who entered the premises of Western on June 4, 1969, without the knowledge or consent of anyone from Western, and made his readings. It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence.

. . .

"Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question. This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be

based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made."

The respondent at the hearing put on evidence of its emissions, both before and after the date the enforcement official was on its premises. Typical of the response of the Board to this evidence are the following colloquies which took place:

"Mr. Heaton: The violation, I think, is June 4. You did not present evidence that you were not in violation on June 4.

"Mr. Cawelti: Of course, I think we all have to realize that it is physically impossible, because we didn't even know that we were being examined on June 4, and it wasn't until some 20 days later (sic) that we had been examined on that date, so we can't say exactly what happened on that day, because it is a matter of history by the time we heard we were being charged for it." (Transcript, October 16, 1969, pages 8-9, continued hearing before the Board.)

. . .

"Mr. Heaton: Let me talk about the law on June 4. The specific law on June 4. As the law on that date, and as it reads on June 16. Could you have been in violation on those dates?

"Mr. Cawelti: Yes. Our own view is that we were not, and our own testimony is that we were not.

"Mr. Heaton: No, your testimony was in fact that you were not in violation in August. I don't

have the date of that report, but it was August." (Transcript, October 16, 1969, page 12, continued hearing before the Board.)

Due to this position of the Board, and the fact that respondent was not even aware on the given date that evidence was being gathered against it, it was absolutely impossible for respondent to defend itself.

Although the inspector testified he went on the plant site, he did not contact the men working there nor seek consent for his presence and investigation. Nobody knew anything about it until almost two weeks later. If he had at least spoken to somebody at the plant, they could have looked themselves at what the enforcement inspector was observing before it dissipated or blew away. Instead he drove on, eventually to start the procedures moving for the issuance of the Cease and Desist Order. Respondent did not in any stage of these proceedings argue that it should have two weeks, two days, two hours, or even two minutes advance warning. Respondent has urged that at least it should be told a reading was made a few minutes after the observation and be given the opportunity with its own personnel, however qualified, to present evidence as to the appearance of the emissions at that time. Such a due process requirement in the law does not seem particularly burdensome when the end result could be the closing of respondent's business.

The provisions of CRS 1963, 66-29-8(d), effective 14 days after the date of the Cease and Desist Order here, require the Division to obtain a search warrant where entry and inspection is denied or not consented to. If an entry or inspection is made with stealth, or otherwise without the knowledge of the one to be charged, there is no opportunity to deny or withhold consent to such entry. Petitioner would nullify this legislative mandate by having its inspector go on the premises unidentified and with purpose unstated. Indeed, there is an end-justi-

fies-the-means type of thinking which would permit and encourage this sort of thing, but it is hoped that our laws would forbid it.

Notice of the inspector's presence and his purpose is thus required for two reasons. First, to have an opportunity to object to his inspection, and second, which is so important in this type of case, to be able to see and verify what the inspector at that time sees. This cannot be too much of a burden to place on state enforcement officials.

Petitioner's main argument seems to be directed against the finding of an illegal search by the Colorado courts. Before a direct answer to this argument can be made, two circumstances must be considered.

At the outset, to support their argument, both petitioner and *amicus* states rely on assertions not in the record, i.e., the alleged violation was there "for the whole world to see" (Petition, p. 8) or, "There is nothing so public as a heavy stream of visible emissions issuing from an industrial plant into the surrounding air" (*Amicus* brief, p. 10). These statements are not supported by a citation to, or anything in the record. It is true that a highly visible plume of steam, which is in fact and by statute a noncontaminant, is at times emitted from a dehydrating plant.[1] The difficulty of trying to make an opacity judgment of a steam-mixed emission is discussed at Fols. 281-284 of the Trial Court transcript. If there were anything in the record to support the incredible statement in the *amicus* brief, p. 14, "When the Colorado inspector came within view of the Western Alfalfa plants and saw the heavy plume of emission blowing in the air . . ." there could be some merit to the objections to apply-

[1] The state investigator testified at the September 11, 1969 hearing before the Variance Board, "in several instances they put out a terrific amount of steam plume . . ." (Tr. 9/11/69, p. 15.)

ing the Fourth Amendment. This case must, however, be reviewed on the facts in the record, not facts that might be or are invented. It is an imposition on this Court to seek from it a rule of law to be applied to an invented factual situation. Enough real problems abound.

The Air Pollution Control Act presently requires and required at the time of the hearing before the Variance Board that a search warrant be obtained where entry "or inspection" is denied or not consented to (CRS 1963 66-22-8(d)). See Statutes Involved, *supra*. It is conceded that the state enforcement official at the time of his inspection had entered respondent's premises without the consent or knowledge of respondent and without a search warrant. Since this is the Colorado law presently in effect, no useful purpose would be accomplished by applying that law (not requiring a search warrant) in effect on June 4, 1969. A ruling by this Court, as sought by petitioner, would be to no avail since Colorado law since July 1, 1969, has required such a warrant.

Coming to the merits of petitioner's objection to applying the safeguards of the Fourth Amendment to the activities of the state inspector, it appears that petitioner relies chiefly upon the holding of this Court in *United States* v. *Biswell*, 406 U.S. 311, suggesting that the holding here limited the rule of *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. At the outset, this Court noted in *Biswell* that it was dealing with a "pervasively regulated business" and that the defendant there, in accepting a federal license, did so "with the knowledge that his business records, firearms and ammunition [would] be subject to effective inspection." Such is not the case in the alfalfa dehydrating business. There is no pervasive regulation, licensing or inspection unique to the business provided by law. Not being a firearms dealer, respondent here is rather in the position of the businessman in *See* v.

Seattle, *supra*, who was charged with a fire code violation, and in that case, the court observed:

> ". . . The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." (387 U.S. 543)

This Court clearly distinguished the two situations in its opinion in *Biswell*, and the same distinction is present here.

Something should be said of the repeated references to the need for surprise in making investigations of respondent's emissions. First, nothing respondent has urged in this proceeding would deny the state investigator of any element of surprise in his gathering evidence. Respondent has simply asked that it be advised *at the time* observations are made so that respondent's employees themselves can look at the same thing. Secondly, if the plume in question is so notoriously visible and pervading, as petitioner suggests, there is no need for surprise—"it is there for the world to see." Finally, there is nothing in the record to support the repeated statements that respondent could suddenly, if warned, so alter its operations that the nature of its emissions could be substantially changed.

Petitioner attempts to distinguish the *See* and *Camara* cases, *supra*, on the additional ground that "no criminal prosecution is involved in the Western case," Petition, p. 9. This argument was also made by the enforcement authorities in the *Camara* case. In rejecting the contention, the court there said:

> ". . . we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.
>
> . . .
>
> "Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes. In some cities, discovery of a violation by the inspector leads to a criminal complaint. Even in cities where discovery of a violation produces only an administrative compliance order, refusal to comply is a criminal offense, and the fact of compliance is verified by a second inspection, . . ." (387 U.S., pages 530-531)

Here respondent was put in the position to either cease its operations or subject itself to the possibilities of the penalties provided in CRS 1963, 66-29-15, 1967 Perm. Supp., with the Division using the same type of evidence as in the original charge.

Petitioner also urges that, ". . . it is a violation of the law if the emissions exceed the standards for a period of three minutes, therefore, this is the type of a violation which must be noted and recorded during a very short period of time, . . ." (Petition, p. 10). It is submitted that because the specified three minutes is a *minimum* before there is a violation, observation can be made over any length of time, an entire day, any three minutes of which can provide the basis for a charge. This is exactly opposite of a very short period of time.

In the *amicus curiae* brief, the Colorado Court of Appeals was taken to task on its statement:

> "Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of emissions on the date in question."

This indeed was and is the fundamental objection of respondent throughout these proceedings. *Amicus* now assert that since the law required respondent to be in compliance it, *a fortiori*, should have known of any three minute interval when it was not in compliance! This begs the question. By the same logic, a driver of a car should be able to recall and to specifically testify as to what speed he was driving at a particular time on a day two weeks in the past.[2]

The case presents a peculiar factual situation, and one must wonder if the State of Colorado, or any other state, still follows the practice of the inspector in this case. The Enforcement Division of the Department of Health is charged, not with just catching suspected violators, but also with securing compliance by conference, conciliation, and other non-punitive means. (CRS 1963, 66-29-10(2), Petition App. D-20.) If a violation is observed what good reason can there be not to then and there tell the person responsible? If the violation is clear and obvious, any argument would be settled right then, instead of as here having the "yes-no" dispute continue for four and one-half years. Ringelmann No. 2 and equivalent opacity as used in this case is in large part a subjective judgment, and there can be honestly held differences as to when the degree of obscuration is sufficient to amount to a violation. The presence of large amounts of steam in the emission affects opacity and further compounds the difficulty, or could make impossible an accurate naked eye opacity judgment.

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[2] As to the constant monitoring of stack emissions by respondent's employees urged by *amicus*, it might be appropriate to note at this point that although the state ran a "smoke readers" school, it would certificate only enforcement personnel as "smoke readers" but would give no accreditation to persons from the private sector who might wish to attend. (See comment of the trial court, Petition, Appendix F-4). Perhaps *amicus* did not know of this situation since it was not mentioned in the Court of Appeals opinion.

In summary, certiorari should be denied in this case for the following reasons:

1. In applying Colorado law, the Administrative Code, the Colorado courts held that the decision of the Variance Board was "unsupported by substantial evidence."

2. The action of the state inspector in this case appears unusual at the least, may not even be the existing practice, and no good reason exists to give such practice the approval of this Court.

3. Even if this Court should reverse the Colorado courts and sanction the type of investigation made here, the existing Colorado law would preclude an entry and investigation without consent or warrant.

4. It is good law, and fair treatment, to permit one charged with an air pollution violation to see what the basis of the charge is where the evidence is continually dissipating or blowing away.

5. In view of the foregoing, even if it should be determined that a state air pollution enforcement officer may enter the premises of a suspected violator, without warrant or consent, and against the denial of the owner, the outcome of this case would remain unchanged.

6. It should also be significant, insofar as the importance of the proceeding below is concerned, that the Court of Appeals determined that its opinion should not be published. See Rule 35(f), Colorado Appellate Rules, *supra*. By the terms of the Rule, the opinion sought to be reviewed is not binding on the Colorado trial judges nor is it considered *stare decisis* for the point of law involved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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